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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 370

MARIAN S. HONEYMAN,

Appellant,

vs.

HERBERT G. HANAN, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF HERBERT W. HANAN, DECEASED.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

STATEMENT DISCLOSING MATTER OR GROUND MAKING AGAINST JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES, AND INCLUDING MOTION BY APPELLEE TO DISMISS APPEAL, OR, IN THE ALTERNATIVE, TO AFFIRM THE JUDGMENT OF THE SUPREME COURT OF NEW YORK.

JAMES S. BROWN, JR.,
Attorney for Appellee.

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Now comes the appellee, pursuant to paragraph 3 of Rule 12 of the Rules governing the practice of the Supreme Court of the United States, files herein this statement, and respectfully shows that the Supreme Court of the United States has no jurisdiction to review the judgment in this

case of the Supreme Court of New York, upon the following grounds:

1. The decision of the Federal question now raised on this appeal was not necessary or essential to the determination of the cause.

2. The Federal question now raised, although presented in the appellate State Court, was not timely and was not duly presented and is not timely or duly presented here.

If jurisdiction be taken of this cause, the said appellee respectfully moves that the appeal herein be dismissed, or, in the alternative, respectfully moves that the judgment of the Supreme Court of New York, appealed from, be affirmed, and in support of such motion points out:

3. The decision of the New York Supreme Court on the question raised is in express harmony with the uniform decisions of this Court.

Statement.

This is an appeal from a judgment of the Supreme Court of the State of New York, County of Kings, unanimously affirmed, without opinion, by the Appellate Division of the said Supreme Court of the State of New York for the Second Judicial Department, and unanimously affirmed, without opinion, by the Court of Appeals of the State of New York, the highest court of that State.

There is no dispute about the facts involved, but since some of them are omitted from the appellant's statement the appellee deems it necessary to elaborate upon that statement and give the facts in more detail to insure accuracy and clarity.

On August 26, 1933, there became a law of the State of New York, Chapter 793 of the Laws of 1933 of that State (which is set forth *verbatim* in the appendix annexed

hereto), which was entitled "An Act to amend the Civil Practice Act in Relation to Foreclosure of Mortgages and Actions for Judgments on Bonds Secured by Mortgages", which added to the Civil Practice Act new Section 1077-a, temporarily suspending foreclosure for principal defaults; Section 1077-b, temporarily suspending actions on bonds (secured by mortgages), for principal defaults; Section 1077-c, giving mortgagees the right to apply all income over carrying charges to past due principal; Section 1077-d, prohibiting waiver of any of these provisions as against public policy; Section 1077-e, applying these provisions to pending actions; Section 1077-f, suspending the Statute of Limitations against actions otherwise maintainable during the emergency period, and Section 1077-g, defining the emergency period as from August 26, 1933, to July 1, 1934, and limiting any declaration of unconstitutionality to the section involved in the controversy.

Then two days later, on August 28, 1933, there was passed and became a law Chapter 794 of the Laws of 1933, which was entitled: "An Act to Amend the Civil Practice Act, in Relation to Deficiency Judgments, and Actions to Foreclose Mortgages on Real Property, and Actions to Recover Judgments on Bonds Secured by Mortgages on Real Property."

That Chapter is incorporated in the appellant's statement as to jurisdiction.

(It is a correct copy thereof, except for the following typographical mistakes:

In the first sentence of Section 1083-b (appellant's statement, page 7, line 23) the word "action" should be "section"; and in that same sentence and on line 29 of that same page there should be inserted after the words "is secured" the word "solely". And at the end of that sentence and in line 34 the word "en" should be omitted. On page 8 of the appellant's statement after the last line

quoted from said Section 1083-b, the appellant has omitted a paragraph of the law reading:

"5. This act shall take effect immediately.")

This Chapter 794 added to the said Civil Practice Act new Section 1083-a, temporarily limiting deficiency judgments in actions brought during such emergency period, and new Section 1083-b, temporarily giving the defendant, in an action on a bond instituted during such emergency period, the right to set off the fair and reasonable value of the mortgaged property.

On September 22, 1933, which was less than one month after these Mortgage Moratorium laws took effect, the appellant, alleging herself to be the owner and holder of a bond and mortgage made by one John H. Hanan (then deceased) and the John H. Hanan Realty Company, instituted an action in the New York Supreme Court, New York County, to foreclose the mortgage and for a deficiency judgment. The appellee was a defendant in that action and interposed an answer. The appellant then made a motion for summary judgment against the said John H. Hanan Realty Company and this appellee, which motion was denied as to this appellee but granted as to the said John H. Hanan Realty Company. A decree of foreclosure was entered by the appellant without attempting to bring on for trial and having adjudicated the issues raised by the appellee's answer; and the mortgaged property was sold to the appellant on March 2, 1934. She subsequently moved for a deficiency judgment against the said John H. Hanan Realty Company, which motion was referred to an Official Referee, who, after hearing oral testimony and proofs found, as a fact, that the value of the mortgaged property exceeded the amount of the mort[illegible]ge and the said application of the appellant for a deficiency judgment was therefore denied on May 25, 1934. The following year, on March

20, 1935, the action was discontinued as against this appellee.

In May, 1935, this action at bar was commenced, in the New York Supreme Court, Kings County, against the appellee alone on the collateral bond. The appellant sues herein for $57,969.34 plus interest, that representing the amount due on her mortgage, plus interest and taxes, and foreclosure costs, less the $10,000 at which she bid in the property on the foreclosure sale and less the net rents collected by the receiver. The appellee moved to make the complaint more definite so as to present the basic facts above and the appellant then served the amended complaint which is now part of the record (R. 10).

The allegations of paragraphs IX and X of said amended complaint (R. 13) expressly refer to the said previous foreclosure action, the sale of the property thereunder, the motion for the deficiency judgment and the denial of such motion.

Before the defendant interposed any answer to the amended complaint and before his time to answer had expired, he moved to dismiss the same on the ground that it did not state facts sufficient to constitute a cause of action. Said motion was granted at Special Term, Part I of the Supreme Court, Kings County, and the only decision rendered thereon was the following memorandum:

> "Motion by defendant to dismiss the amended complaint is granted. The Mortgage Moratorium Laws apply to the facts alleged in said complaint."

After that decision and the judgment entered thereon were unanimously affirmed by the Appellate Division, and then unanimously affirmed by the Court of Appeals, the remittitur of the Court of Appeals, on motion of the appellant, was amended to provide:

> "A question under the federal constitution was presented and necessarily passed upon by this Court.

> The plaintiff contended that Chapter 794 of the Laws of the State of New York, enacted in 1933, as amended (Secs. 1083-a and 1083-b of the Civil Practice Act), impair the obligations of contracts and thus violate Article 1, Section 10 of the Constitution of the United States. This Court held that such laws did not violate said provision of Article 1, Section 10, of the Constitution of the United States."

The decision of the Federal question now raised on this appeal was not necessary or essential to the determination of the cause and the same judgment could have been rendered without deciding it.

It is urged that where the record discloses that the judgment of a State court was based not alone upon a ground involving a Federal question but also upon another independent ground broad enough to maintain the judgment, this Court will not take jurisdiction and will dismiss a writ of error.

People ex rel. Doyle v. *Atwell,* 261 U. S. 590;
Eustis v. *Bolles,* 150 U. S. 361;
Dibble v. *Bellingham,* 163 U. S. 63;
Adams v. *Russel,* 229 U. S. 353;
Cuyahoga v. *Northern,* 244 U. S. 300;
Richardson v. *Scott,* 276 U. S. 129.

This is true in spite of the certification by the aforementioned amendment to the remittitur of the Court of Appeals.

Parmelee v. *Lawrence,* 11 Wall. 36;
Brown v. *Atwell,* 92 U. S. 327;
Adams County v. *Burlington,* 112 U. S. 123;
Powell v. *Brunswick,* 150 U. S. 433;
East Tennessee v. *Frazier,* 139 U. S. 288.

In the appellant's said motion to amend the remittitur, and in the order of the Court of Appeals entered thereon

and in the statement as to jurisdiction and other papers filed herein, no reference whatsoever was made by the appellant to Chapter 793 of the Laws of 1933 of the State of New York. It is only the constitutionality of Chapter 794 which is attacked. (Italics ours.)

There is a sharp distinction between the two chapters and the Court of Appeals of New York recognized that, when, in the decision of that Court in *Klinke v. Samuels* (*infra*), Judge Crane, at page 149, said:

> "Whatever inaccuracies in language there may be we are of the opinion that the Legislature intended to stay actions against guarantors by Section 1077 B. and to limit deficiency judgments against them by section 1083 b."

It was the provisions of Chapter 793 (Civil Practice Act, Section 1077-b), the constitutionality of which is not questioned, which precluded the plaintiff's action and made her complaint dismissable on motion. (Italics ours.)

The Court decided that the action was precluded by the "mortgage moratorium laws." The "mortgage moratorium laws" included both Chapters 793 and 794.

It was this Section 1077-b of the Civil Practice Act, that was expressly stressed and urged by the defendant (now the appellee) on the original motion and various appeals. That provided:

> "No action shall be maintainable * * * during such emergency upon any * * * collateral bond * * * so long as no action or proceeding shall be maintainable to foreclose such mortgage * * *."

Since her mortgage had already been foreclosed in 1933, no action or proceeding was maintainable by the appellant to foreclose it again in 1934, and therefore, no action was maintainable on this collateral bond in 1934.

If Chapter 794 was declared unconstitutional, the judgment of the New York Supreme Court would be just as sustainable by reason of that provision of Chapter 793 (Civil Practice Act, Section 1077-b), and the determination of the constitutionality of Chapter 794 was therefore not essential to the determination of the cause.

If Chapters 793 and 794 were both properly before this Court on this Federal question and both were unconstitutional the said amended complaint would have still been dismissable because of the provisions of Section 1078 of the Civil Practice Act which provides:

> "Action for mortgage debt subsequent to beginning foreclosure. While an action to foreclose a mortgage upon real property is pending or after final judgment for the plaintiff therein, no other action shall be commenced or maintained to recover any part of the mortgage debt, without leave of the court in which the former action was brought."

Said amended complaint had no allegation that such leave of the court was procured, because, as a matter of fact it had not been procured.

The Federal question now urged by the appellant is not properly or timely raised.

It is alleged in paragraph "X" of the amended complaint (R. 13) that the appellant, in the foreclosure action had *duly* made a motion for a deficiency judgment, but the same was denied. Although the record of this case does not specifically set it forth, the plaintiff's allegation that she "duly" made such a motion is sufficiently broad to permit of reference to the record of that foreclosure action. It shows that this appellant as plaintiff therein, proceeded with her foreclosure and pursued all the advantages of the remedies afforded by Chapter 794 of the Laws of the State of New York, the constitutionality of which she now at-

tacks; that she did not question the constitutionality in that action, but entered a judgment therein which provided in part as follows:

> "Ordered, Adjudged and Decreed that the plaintiff may apply at the foot of the said judgment after sale thereunder pursuant to Section 1083-a of the Civil Practice Act (as inserted therein by Chapter 794 of Session Laws of the State of New York of the year 1933) for judgment thereon against the defendant, John H. Hanan Realty Company, for such deficiency, if any, as the Court shall deem the plaintiff entitled to."

That the plaintiff proceeded to sell the property; that she bought it in herself, and then duly made a motion for the deficiency; that such application was referred to an Official Referee and on the hearing before him the plaintiff produced her proofs as to what she considered to be the fair and reasonable market value of the property; that the Referee determined the market value thereof to be $70,000, which was greater than the amount due on the mortgage; that his report was confirmed by the said New York Supreme Court of New York County, and the application for a deficiency judgment was thereupon denied. The plaintiff took no appeal from that order of confirmation nor from any other order or judgment therein, but waited a year and then started this action at bar in May, 1935.

The point which the appellee makes is that it was in that foreclosure action that the appellant should have raised any question of the constitutionality of Chapter 794. If her rights were unconstitutionally impaired by such chapter, such impairment occurred then. The plaintiff having failed to urge unconstitutionality in that action, was precluded from doing so in this action or on this appeal.

(6 *Ruling Case Law, Secs.* 95 & 96:)

"The rule is now generally recognized that one who invokes the provisions of a law may be denied the right to question its constitutionality, and cannot even in subsequent litigation aver its unconstitutionality as a defense."

"Where a complaint is made that an act of the legislature or of an administrative board contravenes a constitutional right, the general rule is that it is the duty of the person whose rights are thus invaded to raise the objection at the earliest available opportunity and to exhaust the remedies which may have been provided for the correction of unreasonable and improper orders, before he will be permitted to make an attack in the courts on the constitutionality of the statute. The failure to raise an opportune objection to an order of the court amounting to an invasion of a constitutional right may amount to a waiver of this right."

Instead of attacking the constitutionality of the statute when she had the right so to do, the plaintiff not only elected to proceed with her foreclosure during that emergency period from August 26, 1933, to July 1, 1934, but in the judgment which she caused to be entered expressly adopted the statute, reserved her rights in accordance therewith and willingly submitted to the procedure prescribed thereby in applying for a deficiency judgment pursuant thereto. When her application for a deficiency judgment was denied, she did not attempt to appeal from that order of the Court, but instead, over a year later, proceeded with this second suit.

In her amended complaint in this second suit she did not claim or allege the unconstitutionality of the Chapter 794. Even in the memorandum of law submitted by her in Special Term in opposition to the appellee's motion to dismiss the amended complaint, the appellant made no claim of

unconstitutionality, although she had the same counsel then as she has now. It was after that motion was granted and in her brief to the Appellate Division that the appellant, for the first time, made a point of that question and even then, made it merely incidental to other points urging that these Mortgage Moratorium laws did not apply to her situation.

The decision of the State Court on the question raised is in express harmony with the uniform decisions of this Court.

In view of this Court's decision in *Home Savings & Loan Association* v. *Blaisdell,* 290 U. S. 398, sustaining the constitutionality of a similar statute in Minnesota, the Federal question involved in this case has been so thoroughly discussed and so explicitly foreclosed that there is really no basis for further argument in this Court.

The constitutionality of the New York Mortgage Moratorium laws was sustained by the New York State Court of Appeals in its decisions in the case of *Matter of People* (*Title & Mortgage Guarantee Company of Buffalo*), 264 N. Y. 69, and *Klinke* v. *Samuels,* 264 N. Y. 144, on the strength of that Blaisdell decision.

That decision is too recent to require any specific quotations. Suffice is to say that the statutes involved in that case and this are both Mortgage Moratorium statutes of a temporary nature to cope along the same lines with the identical emergency.

The situation which existed in Minnesota and which prompted their emergency measure in April, 1933, was no different and possibly not as acute as that which existed in New York and prompted its temporary measures in August, 1933. The larger number of buildings in New York State meant just that many more mortgages and made for more foreclosures and more deficiency judgments.

To quote from Judge Crane's decision in *Klinke* v. *Samuels* (*supra*):

> "As to the constitutionality of these provisions we must remember that the limitation upon the remedy in both or all instances is until July 1, 1934. There being no market for real estate of any kind, and the banks refusing to loan money on the best of real estate security, owners were caught, as it were, in a trap due to conditions over which no one had control and for which no relief was at hand. Value was in the property but the value could not be obtained nor anything like it. To prevent worse and more extensive evils and suffering, the Legislature had asked through these laws, for security holders to wait a reasonable time for universal economic conditions to improve, provided interest and taxes are paid.
>
> After next July all remedies, so far as these present laws apply, will again be open to the mortgage creditors.
>
> "That such legislation, reasonably seeking only temporary relief, is not unconstitutional, we may refer to our recent decision in Matter of People (Title & Mortgage Guarantee Co. of Buffalo) (264 N. Y. 69), and Home Building & Loan Assn. *v.* Blaisdell (290 U. S. 398)."

Section 794 of the New York Law (Sec. 1083-a of Civil Practice Act) did not impair any contract rights; it defined the procedure under which a deficiency judgment after foreclosure could be had; and temporarily limited such deficiency to an amount equal to the amount due on the mortgage plus interest, plus the amounts of all prior encumbrances, plus all the foreclosure costs and disbursements, less the market value of the property as determined by the court on the proofs submitted by the parties involved. Section 1083-b, Civil Practice Act, gave a party liable on a bond secured by mortgage the right to set off such market value less such amounts owing on prior encumbrances.

A foreclosure action is one in equity and the sale is subject to confirmation by the court. As was said by Mr. Justice Hughes in the *Blaisdell* case at page 446:

> "In the absence of legislation courts of equity have exercised jurisdiction in suits for the foreclosure of mortgages to fix the time and terms of sale and to refuse to confirm sales upon equitable grounds where they were found to be unfair or inadequacy of price was so gross as to shock the conscience."

This statute went no further. It tended to keep the deficiency judgments down to what they would have been in normal times and thereby avoid unjust enrichment to a mortgagee at the expense of the mortgagor.

It would be difficult to find a better example of "inadequacy of price" than in the case at bar. Here we have a piece of property which, in 1907, was obviously of sufficient value to stand a first mortgage of $118,000 (Paragraph 1 of amended complaint R. 10), which mortgage was, in 1920, reduced to $60,000. The property was sold at the foreclosure auction sale in 1934 to the plaintiff for $10,000. After taking the property she now seeks, in addition, a deficiency judgment for $57,969.34. A court of equity might readily refuse it as unconscionable, regardless of any emergency statutes.

Respectfully submitted,

JAMES S. BROWN, JR.,
Attorney for Appellee,
66 Court Street,
Brooklyn, N. Y.

APPENDIX.

Chapter 793.

AN ACT to amend the civil practice act, in relation to foreclosure of mortgages and actions for judgments on bonds secured by mortgages.

Became a law August 26, 1933, with the approval of the Governor. Passed, on message of necessity, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. It is hereby declared that a serious public emergency, affecting and threatening the welfare, comfort and safety of the people of the state and resulting from the abnormal disruption in economic and financial processes, the abnormal credit and currency situation in the state and nation, the abnormal deflation of real property values and the curtailment of incomes by unemployment and other adverse conditions, exists. Therefore, in the public interest, the necessity for legislative intervention by the enactment of the provisions hereinafter prescribed, and their application until July first, nineteen hundred thirty-four, is hereby declared as a matter of legislative determination.

SECTION 2. The civil practice act is hereby amended by inserting therein new sections, to be sections ten hundred seventy-seven-a, ten hundred seventy-seven-b, ten hundred seventy-seven-c, ten hundred seventy-seven-d, ten hundred seventy-seven-e, ten hundred seventy-seven-f and ten hundred seventy-seven-g, to read as follows:

SECTION 1077-a. FORECLOSURE FOR PRINCIPAL DEFAULTS SUSPENDED.—During the period of the emergency as defined in section ten hundred seventy-seven-g, and not withstanding any inconsistent provisions of the civil practice act or of any other general or special law, or of any agreement, bond or mortgage, no action or proceeding for the foreclosure of a mortgage upon real property, nor any foreclosure under article seventeen of the real property law, shall be maintainable, solely for or on account of a default in the payment of principal secured by such mortgage or solely in

the payment of any installment of principal secured by such mortgage, although the payment of such principal or installment of principal may be due by the terms of such agreement, bond or mortgage, provided, however, that where a default authorizing foreclosure shall have occurred under the terms of the bond or mortgage or other agreement, other than the non-payment of principal or an installment of principal, and any grace period therein specified shall have expired, then the rights and remedies of the holder of the mortgage shall not be affected by this act.

SECTION 1077-b. ACTIONS ON BONDS FOR PRINCIPAL DEFAULTS SUSPENDED.—No action shall be maintainable or judgment shall be entered during such emergency, upon any loan, indebtedness, bond, extension agreement, collateral bond, or other evidence of indebtedness or liability, whether or not such indebtedness or liability shall have been thereafter reduced, extended, or modified, if the indebtedness originated or was originally contracted for simultaneously with such mortgage and is secured solely by such mortgage, or upon any guaranty of payment of the principal or installment of principal of any mortgage within the scope of section ten hundred seventy-seven-a or upon a guaranty of any obligation secured by such mortgage, so long as no action or proceeding shall be maintainable to foreclose such mortgage. No action shall be maintainable or judgment be entered during such emergency upon any guaranty of payment of any share or part of any bond and/or mortgage or group of bonds and/or mortgages represented by a certificate, bond, debenture or other instrument, nor upon any note, bond, debenture or other instrument being part of a series issued against, or secured by the deposit of a bond and/or mortgage or a group of bonds and/or mortgages so long as interest at the rate prescribed shall be paid upon any such certificate, note, bond, debenture or other instrument. The liability of any endorser, guarantor of, or surety for any such liability shall not be discharged by reason of the failure of the holder to demand payment of any such indebtedness or liability, or by reason of any failure to give notice of non-payment, or by reason of any failure to bring any action or proceeding thereon during the emergency.

SECTION 1077-c. NOTICE OF APPLICATION.—Notwithstanding the foregoing provisions, any person who would otherwise have the right to foreclose a mortgage, shall have the right to make an application to any court in which such foreclosure action might be brought upon eight days notice, served personally, or in such manner as the court may direct to the last record owner of the mortgaged property, and if upon such application it shall appear to the satisfaction of the court that the mortgaged property during the six months prior to the application shall have produced a surplus over and above the taxes, interest and all other carrying charges, then the court may make an order directing the payment of such surplus or such part thereof as the court may determine to the mortgagee to apply toward the reduction of any past due principal. In the event of default in making of such payment for thirty days after service of a copy thereof with notice of entry thereof, then and in such event the applicant may maintain an action to foreclose such mortgage. In any such proceeding the court may enter an order permitting foreclosure without other proof if the owner of the property shall fail to make available for inspection by the mortgagee and the court all records and data available as to the income and disbursements, or if the owner shall fail to produce adequate records or data of income and disbursements.

This section shall not apply to properties used or intended to be used for farming purposes or dwellings occupied by the owner or by the owner in conjunction with not more than one other family.

SECTION 1077-d. WAIVER AGAINST PUBLIC POLICY.—Any covenant or agreement or understanding in or in connection with or collateral to any mortgage whereby a mortgagor waives or agrees to waive the protection intended to be afforded to him by sections ten hundred seventy-seven-a and ten hundred seventy-seven-b, shall be deemed to be void as against the public policy and be wholly unenforceable.

SECTION 1077-e. APPLICATION TO PENDING ACTIONS.—Sections ten hundred seventy-seven-a, ten hundred seventy-seven-b, ten hundred seventy-seven-d shall apply to any action or proceeding heretofore instituted for the foreclosure of a mortgage within the scope of this act unless the

same has proceeded to final judgment directing the sale of the mortgaged premises, and any such action shall be dismissed upon payment by any defendant to the plaintiff of taxable costs and the remedying of any default other than the payment of principal or any installment of principal within thirty days after this act takes effect, but otherwise such action or proceeding may continue.

SECTION 1077-f. STATUTE OF LIMITATIONS NOT TO RUN DURING EMERGENCY.—Any action or proceeding within the scope of this act, which would have been maintainable at any time during the period of the emergency, shall not be barred by any provision of article two of the civil practice act during a period of one year after the termination of the emergency. This section shall not be construed to shorten the period within which any such action may be commenced.

SECTION 1077-g. MORTGAGES NOT AFFECTED.—The provision of sections ten hundred seventy-seven-a, ten hundred seventy-seven-b, ten hundred seventy-seven-c, ten hundred seventy-seven-d, ten hundred seventy-seven-e and ten hundred seventy-seven-f shall not apply to any mortgage held by a savings and loan association, payable in monthly installments over a period of more than ten years from the time of the making of the loan, or made in accordance with the provisions of sections three hundred eighty-four or three hundred eighty-five of the banking law nor to any mortgage dated on or after July first, nineteen hundred thirty-two, nor to any obligations in connection with or secured by any such mortgages. The period of the emergency shall be from the date this act takes effect until July first, nineteen hundred thirty-four.

SECTION 3. If any section, part or provision of this act shall be declared unconstitutional or invalid or ineffective by any court of competent jurisdiction, such declaration shall be limited to the section, part or provision directly involved in the controversy in which such declaration was made and shall not affect any other section, provision or part thereof.

SECTION 4. This act shall take effect immediately.